Boulder Excavating Company and Jimmy Lee Stevens. Case 27-CA-6836

March 29, 1982

DECISION AND ORDER

By Members Jenkins, Zimmerman, and Hunter

On August 5, 1981, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

ROGER B. HOLMES, Administrative Law Judge: Based on an unfair labor practice charge filed on July 29, 1980, by Jimmy Lee Stevens, on August 29, 1980, the General Counsel issued a complaint alleging violations of Section 8(a)(1) and (3) of the Act by Boulder Excavating Company.

The hearing was held on May 12 and 13, 1981, in Denver, Colorado. The due date for the filing of post-trial briefs was set for June 17, 1981. The General Counsel's motion to correct the transcript, which was filed with his brief and which has not been opposed, is hereby granted. In addition, Stevens gave his name as indicated above when he appeared as a witness during the hearing. Therefore, I have changed the case caption to reflect the name which he gave during his appearance on the witness stand.

FINDINGS OF FACT

I. JURISDICTION

The Board's jurisdiction is in issue in this case. At all times material herein, the Respondent has been engaged in the excavation business. It has an office and place of business located at Boulder, Colorado. The Respondent is incorporated under the laws of the State of Colorado.

During the Respondent's 1979 fiscal year, the Respondent provided services in the amounts indicated for the following named entities: Beech Aircraft, \$20,242.85; Arapahoe Chemical, \$16,545.80; University of Colorado, \$11,561.92; and the city of Boulder, \$7,716. Thus, the total value of the services provided by the Respondent to those entities during that period of time was \$56,066.57. On an annual basis, each one of the named entities annually purchases and receives goods and materials valued in excess of \$50,000 directly from points and places located outside the State of Colorado.

The facts in the preceding paragraph were agreed to by the parties at the hearing. However, the legal conclusions to be drawn from those facts remain in issue. The issue had earlier been raised in pre-trial pleadings. Associate Chief Administrative Law Judge William J. Pannier III relied on the Board's decision in Carroll-Naslund Disposal, Inc., 152 NLRB 861 (1965), in his Order Denying Motion to Dismiss for Lack of Jurisdiction and Denying Motion for Bill of Particulars, which was issued on April 23, 1981. The factual allegations regarding commerce data were different at that time. (See G.C. Exh. 1(f).) However, I find that the Board's decision in Carroll-Naslund is equally applicable to the commerce facts subsequently agreed to at the hearing.

In a decision issued on June 23, 1981, the Board stated in Southern Alleghenies Disposal Services, Inc., 256 NLRB 852:

It is well established that the Board will assert jurisdiction over a nonretail enterprise which has an annual outflow or inflow, direct or indirect, across state lines of at least \$50,000. Siemons Mailing Service, 122 NLRB 81, 85 (1958). As enunciated by the Board in Siemons, indirect outflow refers to sales of goods or services within the State to "users" meeting any standard except solely an indirect inflow or indirect outflow standard. Further, the Board stated that it would continue to define as "users" enterprises which themselves were exempted from the Board's jurisdiction but whose operations were of a magnitude that the Board would assert jurisdiction if they were nonexempt.

Here, although the city of Johnstown is exempt from the Board's jurisdiction under Section 2(2) of the Act, the magnitude of its operations would clearly warrant our assertion of jurisdiction over it if it were nonexempt. Accordingly, because the Respondent's sales of services to the city of Johnstown are in excess of \$50,000, the indirect outflow standard has been met. We therefore find that it will ef-

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

fectuate the purposes of the Act to assert jurisdiction herein.⁵

⁴ We thus find it unnecessary to address the General Counsel's alternative argument for assertion of jurisdiction over Respondent based on Respondent's services to other enterprises which are directly engaged in interstate commerce.

⁵ We expressly disavow the Administrative Law Judge's characterization of Respondent's operation as a purely local function which does not affect interstate commerce. See Carroll-Naslund Disposal. Inc., 152 NLRB 861 (1965); Nichols Sanitation. Inc., 230 NLRB 834 (1977).

After considering the foregoing and the entire record, I find that the Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Labor organization

The question of whether International Union of Operating Engineers Local No. 9, AFL-CIO, is a labor organization within the meaning of the Act is an issue in this case.

The Union is described as Local No. 1 in paragraph III of the General Counsel's complaint. (See G.C. Exh. 1(c).) However, both the testimony and the documentary evidence at the hearing revealed that the correct number is Local No. 9. I find the other designation to be merely a typographical error.

According to the credible testimony given by Daniel P. McAuliffe, who has been a business agent of the Union for the past 4-1/2 years, employees participate as members of the Union, and the Union exists for the purpose of representing employees regarding their wages and working conditions. The Union will process the grievance of an employee, where appropriate; but, the Union has had only minimal problems with the Respondent and no formal grievances regarding the Respondent's employees.

Introduced into evidence as the General Counsel's Exhibit 2 was a copy of the master agreement between the Union and various employers in the State of Colorado. The effective dates of that collective-bargaining agreement were from May 1, 1978, to May 1, 1981. At the time of the hearing in this proceeding, the contract had been extended during the negotiations for a new agreement. Introduced into evidence as the General Counsel's Exhibit 2(a) was a copy of a short-form agreement between the Union and the Respondent. Among other things, that agreement incorporates the terms of the master agreement into the contract between the union and the Respondent. One of the several job classifications covered in the master agreement is "assistant to engineer (oiler)." That terminology includes equipment oilers and crane oilers. The contract does not cover truckdrivers.

McAuliffe described several ways at the hearing by which a person could become a union member. One of those ways involved the person's obtaining experience through on-the-job training with his employer. McAuliffe stated:

Or we also have contractors that over a period of time, they have employees that gather enough experience to be able to operate the equipment, say, as laborers or truck drivers. Now, when this experience is gathered and we have no one on our out-of-work list during the height of our season, which is the summer months and into the fall, if we cannot supply a qualified employee within 24 hours, then they are entitled to have the employee that they feel is qualified make application to the union and we have to accept him as a member, or her.

After considering the foregoing and the record in this case, I find that the union meets the statutory definition of a labor organization as set forth in Section 2(5) of the Act

3. The witnesses

As indicated in section 2 herein, I have relied on the credited testimony of McAuliffe and upon the documentary evidence mentioned therein in making the findings of fact which are set forth in that section.

Michael Dennis Clark has been the general superintendent of the Respondent for about the past 2 years. Clark was a knowledgeable witness who appeared on the witness stand to be relating the facts accurately and to the best of his ability to do so. He demonstrated that he had a good recollection of the events about which he testified. I found his testimony to be accurate and reliable, and I have credited his version of the events over that given by any other witness.

The testimony given by Clark is consistent on many points with the testimony given by Steven W. Haskins, who has been the chief executive officer of the Respondent for approximately 4 years. However, there are some differences in their accounts, but those differences are not so crucial as to warrant rejection of Haskins' other testimony. I have also considered the fact that Haskins testified that the reason for the termination of Jimmy Lee Stevens was "Because he refused to deliver a load of material." When Haskins was questioned as to whether that was the "only reason," Haskins agreed that it was. However, after being confronted by counsel for the General Counsel with his pretrial affidavit, Haskins acknowledged that Stevens' refusal to oil about a week earlier was also "a small reason." That portion of his hearing testimony bears a remarkable similarity with a portion of his pretrial affidavit. (See Resp. Exh. 1.) In his pretrial affidavit, Haskins related the fact that Stevens had refused to drive a certain truck for the Respondent. He then stated in his affidavit, "That was the only reason he was fired." Two paragraphs later in his affidavit, Haskins related the fact that Stevens had refused to oil, and he said, "This played only a minor part in the discharge." If the word "only" is considered in the sense of "solely" or "exclusively" in that context, then Haskins was incorrect in stating that Stevens' refusal to deliver a load of material was the "only" reason for Stevens' termination. Nowithstanding that apparent error, I found much of Haskins' to be believable, and I have relied upon portions of his testimony except for some differences in his testimony with Clark's account. Haskins admittedly could not recall the sequence of the matters in his conversation with Stevens on June 27, 1980, and, therefore, I have relied on Stevens' version.

The testimony given by Stevens at the hearing significantly conflicts both with the testimony given by Clark and the testimony given by Haskins on numerous points. I was not persuaded that Stevens' versions of these events were more accurate and reliable than the accounts given by Clark and Haskins. Having accepted Clark's testimony, and having relied on portions of Haskins' testimony, as indicated above, I cannot accept testimony which is contradictory to their versions. Therefore, I have relied on Stevens' testimony: (1) with regard to his conversation with Dawn MacPherson on June 26, 1980; (2) with regard to his conversation with Haskins on June 27, 1980; and (3) with regard to his identification of certain documents. In other respects, I have not credited his account.

Dawn MacPherson has been the dispatcher of the Respondent. I have relied on her testimony only to the extent that: (1) she identified certain business records with which she was familiar; (2) she related that she received the order from Bickhard Construction on June 26, 1980; and (3) she gave her opinion of the job performance of Stevens. As to the other matters, I found that Clark and Haskins had the better recollections of these events. Considering the foregoing and the variation from her testimony pointed out by the counsel for the General Counsel regarding her pretrial affidavit (G.C. Exh. 4), I shall rely on Stevens' version of his conversation with MacPherson on June 26, 1980.

Counsel for the General Counsel correctly points out in his post-trial brief that there are conflicts between portions of the testimony given by Robert M. Laingor, who is the president of the Respondent and the principal stockholder, and portions of the testimony given by Clark and Haskins. (See pp. 7 and 8 of his brief.) The most significant conflict pertains to the number of reasons which Laingor related were given to him by Haskins after Haskins had terminated Stevens. I have decided to rely on Haskins' version because: (1) Haskins was the one who actually made the decision to terminate Stevens; and (2) Haskins was the one who actually discharged Stevens. While the other matters apparently either had been reported to Laingor earlier, or had been observed by Laingor earlier, I am persuaded that the reasons for Haskins' taking action in discharging Stevens were the ones which Haskins stated at the hearing. I have not overlooked the fact that Laingor is the uncle of Haskins and that MacPherson is married to a cousin of Laingor. However, while those family relationships have been considered, they do not alter the credibility resolutions mentioned above.

4. The events prior to June 26, 1980

The usual workweek for employees of the Respondent was from 8 a.m. to 4:30 p.m., if work were available, on Mondays through Fridays. Payday was on Friday. Clark explained in general about the comments of employees regarding their wages and hours:

During the winter everybody gets upset about their hours. It's a very seasonal business. During the summer, August, September, everybody's tired and they want off. They gripe about their hours in the winter, and they gripe about their hours in the summer. I'm caught between a rock and hard spot. It's either too much or not enough.

When employees expressed their dissatisfaction to him about the low number of working hours during the winter months, Clark told the employees that things would improve in the spring if the employees would stay with the Company.

The Respondent's operators received an hourly wage rate which was higher than that received by the Respondent's truckdrivers, who were not represented for collective-bargaining purposes by a union. However, when a truckdriver performed an operator's task, he was paid \$1 an hour below the union scale, which, according to Haskins, was "higher than the truck driver rate and lower than a regular union rate for a full-time member." Haskins explained the reason for the pay rate: "This is a nonunion truck driver who is performing a union task While they're obtaining training before they join the union."

Sometimes the Respondent's operators drive trucks for the Respondent. When they do so, the longtime operators are still paid their union wage scale even though they are performing a work task outside the coverage of the contract. However, operators who have worked for the Respondent for only 4 or 5 years receive the lower rate paid to the Respondent's truckdrivers.

The Respondent utilizes eight trucks in the operation of its business. Four of those trucks are 1979 International trucks. Three of those trucks are 1973-74 Dodge trucks. All of those trucks are capable of hauling 12-yard loads. The oldest truck used by the Respondent is a single axle Ford dump truck, which is capable of hauling a 5-yard load. That truck is designated by the Respondent as the T-10. Clark gave this description of the T-10: "It's an older truck, about a '65 Ford, single axle, dump truck, capacity approximately five cubic yards. We've had it for quite awhile. It's not the best looking truck we've got, but it is functional and it does pass safety 'specs' on the road." Clark said that the T-10 was sometimes missing a window on the driver's side, but that the company tried to replace the window as soon as it could do so. He acknowledged that the driver's side window had been missing for a couple of weeks prior to June 26, 1980, and that the window was still out on June 26, 1980. Clark compared driving one of the newer International trucks to the old T-10 truck as follows: "It's like driving, a Cadillac compared to a Volkswagen."

The employees of the Respondent do not have the privilege of selecting the particular truck that they will drive. Instead, the trucks are assigned by Clark to the employees for a particular delivery. Clark tried to accommodate Stevens' preference for driving one of the newer 1979 International trucks. In particular, Stevens preferred T-23, and Clark assigned that truck to Stevens more often than to all of the other truckdrivers combined. Clark also attempted to accommodate the other truckdrivers with their preferences, when he was able to do so, in order to keep the truckdrivers happy. With

regard to the T-10, Clark had assigned that truck to Stevens on a number of occasions prior to June 26, 1980, and Stevens had not refused to drive the T-10 prior to June 26, 1980. Clark was aware, from what MacPherson had told him, that Stevens had refused to drive one of the Dodge trucks on one occasion a month or two prior to June 26, 1980, but Clark took no action against Stevens at that time.

On May 19, 1980, the T-10 was used to deliver a load ordered by the Bickhard Construction Company for the Boulder Memorial Hospital jobsite. Jack Bent drove the T-10. It took him 1 hour and 5 minutes to complete that trip from the time that Bent left the Respondent's shop until the time he returned to the Respondent's premises. On June 2, 1980, another load was delivered in the T-10 to the Boulder Memorial Hospital jobsite on orders from the Bickhard Construction Company. Gary Wright delivered that load of inch-and-a-half rock. Clark explained at the hearing that only a small truck of the size of the T-10 could deliver the loads to the north side of the hospital site. He stated:

At Boulder Memorial Hospital, on the north side of the hospital, there is a parking lot. From that parking lot, the new addition is on the west end of the hospital. We had to back the truck up a fairly steep incline under some low wires. This is why a big truck wouldn't fit in there. We had to have a smaller, lower-profile truck to get up the hill, go underneath the wires, and dump the load.

In addition to the foregoing, the T-10 had been utilized for other deliveries in June 1980 prior to June 26, 1980. One delivery was on June 6, for Haas Construction. Jack Bent made that delivery for the Respondent. Another delivery was on June 12, for the Economy Institute, which employee Pat Beland delivered. Another delivery was on June 24, for the Arapahoe Chemical, which Stevens delivered for the Respondent.

When employees are hired by the Respondent, they are told that a condition of their employment is that they learn to operate the equipment, and after learning to do so, the employees are expected to join the Union. Several times during the winter months of 1980, Stevens requested Haskins' assistance in getting Stevens into the Union. Haskins advised Stevens that he would have to learn how to operate the equipment, and because it was wintertime, there was no way that the Union would allow Stevens to come to work for the Respondent in an operator's position. (See the dispatch procedures set forth in the collective-bargaining agreement between the Union and the Respondent (G.C. Exhs. 2 and 2(a).) Recall also the seasonal decline in the Respondent's business during the cold winter months.) Nevertheless, Haskins did talk with Union Business Agent McAuliffe in January or February 1980 and "told him that I had a good man and I wanted to get him in the union.'

Clark recalled an occasion when he suggested to Stevens that he learn how to operate a backhoe in the Respondent's yard. He explained to Stevens that Stevens needed to know how to operate such equipment in order to get into the union.

About 2 weeks prior to June 26, 1980, Haskins told Clark to fill out an application for Stevens to join the Union. Clark did so at that time except for some items on the application form, such as the name of Stevens' beneficiary. Clark gave the union application form to Stevens the next day, and Clark told Stevens to fill out the rest of the items on the union application.

On June 23, 1980, Haskins spoke with Stevens regarding the Union. Haskins informed Stevens of the hours that the union hall was open, and he inquired whether Stevens was going to the union hall that night to join the Union. Stevens asked Haskins if Haskins would pay him the Union's scale for driving a truck. Haskins said no. Stevens replied that he did not think he would join the Union.

The task of oiling was explained by Haskins at the hearing as follows:

You must deliver the crane to a particular job; you must know how to rig different loads on the crane; you're responsible for oil levels, fuel levels, water levels on different engines on the crane; you're required to assist the operator whenever he required assistance—he possibly might be working blind on the job, you have to know the proper hand signals to give.

Haskins said that Stevens knew how to get the crane to the jobsite, but that Stevens did not know how to run any heavy equipment. Haskins described the task of oiling as being the initial step in learning the operator's job. When Stevens refused to perform the task of oiling, Haskins felt that Stevens was no longer interested in joining the Union. Haskins testified:

Well, he wouldn't be qualified to join the union. He didn't know how to run any equipment. Oiling is the first initial step down this learning path, and by refusing to do so, as far as I was concerned, he was no longer interested in joining No. 9.

Management personnel expressed favorable opinions at the hearing with regard to Stevens' job performance. Clark said, "Jim was a good truck driver," and Clark felt that there had been no reason to discipline Stevens prior to June 26, 1980. Haskins said, "Jim was an excellent truck driver. He knew the town; knew the Internationals, and he could really do the job well." With regard to Stevens' refusals prior to June 26, 1980, to drive certain trucks, Haskins stated, ". . . at the time I was able to work around them, so I figured I can get this thing straightened out." Haskins said that Stevens' earlier refusals had not been held against him, and that there had been no discipline of Stevens prior to June 26, 1980. Laingor said, "With a few exceptions, I think he got along fine. The man is neat, well-mannered, competent, and other than a few occasions when anybody might want to argue about something, I certainly never had any objections to his attitude." MacPherson said, "I know that I used Jim quite a bit when I had a difficult load to find, or something like that, because I knew that he would be able to handle it. If he got lost, he would call in or ask someone else. We don't always have that

advantage with all the truck drivers, and I used him when I could."

One truckdriver, other than Stevens, was terminated by the Respondent after he refused to deliver a load. That happened about 1 year prior to June 26, 1980. The employee involved was named Dan Ashley. Haskins terminated Ashley because Ashley refused to take a backhoe to an IBM jobsite. Ashley was a member of the Union at the time.

5. The events on June 26, 1980

On June 26, 1980, Stevens delivered a load for Beech Aircraft. He left the Respondent's shop at 8 a.m. that day, and he returned to the shop at 1:15 p.m. Stevens worked through his lunch hour. He drove the International truck known as T-23 for the Beech Aircraft delivery.

Also on June 26, 1980, dispatcher MacPherson received a telephone order from Roland Bickhard of the Bickhard Construction Company for the delivery of a 5-yard load of inch-and-a-half rock to the Boulder Memorial Hospital jobsite. Bickhard specified that the delivery was to be made before 2:30 p.m. that same day, and that the delivery be made in a small truck so that it could get into the area.

After Stevens returned to the shop from the Beech Aircraft delivery that afternoon, he and MacPherson had a brief conversation. Stevens testified: "Dawn just said she had a load for me in T-10, and I waited for a couple of minutes, and she didn't say anything so I told her I was going to go out to the shop, or the waiting room, and eat my lunch."

Next, MacPherson informed General Superintendent Clark about the order which had been received from Bickhard Construction, as described above. To Clark's knowledge, MacPherson had not asked Stevens to take that load of rock. Clark also testified:

Okay. Dawn MacPherson, dispatcher at the time, told me we had to get a load of rock to Bickhard Construction. I asked her who I had in the shop and she said Jim was in. So, I went immediately to the shop office and Jim was in there. I think he was changing his shoes or something. I said, "Jim, would you take that load to Bickhard at the hospital? It's a load of inch-and-a-half washed rock on T-10." He said, "No."

Well, that's the first time I'd ever been—somebody had actually said, "No, I'm not going to do that." So I just turned around, and I had another man there in the shop, one of the shop helpers, and I asked him, I said, "Ed, would you take that load to Bickhard Construction?" He said, "Yes." So, Ed delivered the load.

Q. Was Ed a truck driver?

A. Yes. He was also shop helper and anything else we needed.

Concerning Ed Roe, Clark also testified: "He would sweep the floors, break tires, anything else we needed like that. If we got in a bind in the field and needed another truck out, we had one in the yard, Ed would drive a truck." However, Roe worked primarily as a shop helper, as distinguished from a truckdriver, and Clark pointed out at the hearing that Stevens was the only one in the truckdriver classification who was available at that point in time to make the Bickhard Construction delivery by 2:30 p.m. Clark also pointed out that the T-10 was the only truck which the Respondent had that would be able to make the delivery to the north side of the Boulder Memorial Hospital jobsite. (Note the preceding section regarding the use of the T-10 in two earlier deliveries to that jobsite.) With regard to the absence of a window on the driver's side of the T-10, Clark acknowledged that there may have been some thunderstorms that day in Boulder, but that there was not constant rain. The Bickhard Construction delivery was made that day in the T-10 by Roe. The records disclosed that Roe left the Respondent's facility at 1:15 p.m., and that he returned to the dispatch office at 2:40 p.m. that day.

Haskins was first informed about Stevens' refusal to make the Bickhard Construction delivery by means of a two-way radio conversation. Haskins spent most of the day on June 26, 1980, in Denver at the Hewlett-Packard office. He returned to the Respondent's office in Boulder about 4 p.m. At that time Clark spoke in person with Haskins and recommended to Haskins that Stevens be terminated. Clark testified:

He wasn't angry. I told him the circumstances behind it; that Jim had refused to drive the truck, and that this is the fourth or fifth time he has refused to do something around Boulder Excavating, and I couldn't function with an employee like that. And he said, "Well, think about it, calm down, and we'll see what happens." But I did make my recommendation.

The reference to the person who was not angry at that time was to Haskins, who acknowledged that he has a temper.

6. The events on June 27, 1980

Haskins did not make his decision to terminate Stevens until the next day, which was Friday, June 27, 1980. Haskins explained at the hearing why he did not make the decision on Thursday: "Well, to think on it a day, figure out exactly what I was doing. It's hard for me to terminate somebody. I really had to think about it, and that's why I took a day to think about it."

About 4 p.m. Haskins came into the dispatch office and told Clark, "Well, I'm going to take your recommendation." Then Haskins left for a nearby bar, which is called "The Bus Stop," to collect for some repair work which the Respondent earlier had performed on the parking lot. A few minutes later, Stevens came into the dispatch office, and he told Clark that he wanted to speak with Haskins. Clark replied that Haskins was not there at the moment, but that Haskins would be back shortly.

When Haskins returned in a few minutes to the Respondent's facility, he and Stevens had their final conversation in which Haskins terminated Stevens. However, Haskins stated at the hearing that he had already made

up his mind to terminate Stevens prior to his last conversation with Stevens. As indicated previously, Haskins could not recall the sequence of the events during his conversation with Stevens. Haskins testified with candor, "I can't recall the order of the conversation. I recall his threats, and I recall that I terminated him, and I don't know which occurred first."

Stevens described his conversation with Haskins on June 27, 1980, as follows:

I told Steve I thought we had better have a little discussion over the way the work was going and so forth. He had made several commitments to me; none that had come through, such as, they were going to get uniforms for me, I was going to be on the company medical policy. I was supposed to have been in the union by then. Steve had agreed to get me in the union and pay the contract scale for whatever work I was doing, which never came about.

I was just rather concerned that now, because all this had transpired, my hours had dropped dramatically that week, new drivers had been hired on, I told him I didn't really think it was right. I had stayed through the winter when they were saying, "Well, stay through the winter; come Spring there will be work and we'll get you in the union and so forth." None of this was developing.

Q. This is what you said to Mr. Haskins?

A. To Mr. Haskins, yes. I told him that I thought I had played fairly with the company, been honest with them, and I had just been shafted for the experience. At that point Steve said he had never had anybody speak to him

* * * * *

THE WITNESS: Well, after the point where Steve said he had never had anyone speak to him that way before and he didn't like it, I told him, "Well, here's something else you probably won't like either. If we cannot come to an understanding here, I'm going to contact every labor organization, union hall, and I think the IRS would be interested in your policy of paying cash occasionally, and I'll contact every outside force I can think of in order to get some satisfaction here."

At that point Steve told me, "If that's the way you feel about it, the only reason you have to come in to work on Monday is to pick up your check." I asked him, "Are you firing me?" He said, "I have no choice. You refused to do some work for us, and I have no choice." I wanted him to clarify that point so I said, "You are firing me." He said, "Yes."

At that point I told him, "Well, let's go inside and make the check out now because I see no sense in driving back over here from Longmont Monday just to pick up a check."

After the foregoing had taken place, Haskins spoke to Clark and told him, "Jim is gone." That occurred about 4:20 or 4:25 p.m.

At the hearing Haskins offered this explanation as to why Haskins had not terminated Stevens earlier for his refusals to drive Dodge trucks: "Benefit of the doubt. I thought we could get things worked out to where Jim could get in the union and work as an oiler for us."

7. The unemployment compensation finding

Introduced into evidence as General Counsel's Exhibit 5 was a copy of the first page of the claim filed by Stevens with the State of Colorado Department of Labor and Employment with regard to Stevens' termination by the Respondent. The claim form indicates that it was filed on July 8, 1980. Haskins said at the hearing, "I remember seeing it, but that's all I remember about it." Haskins acknowledged that the Respondent had not contested Stevens' unemployment insurance claim. He indicated that it was the policy of the Respondent to allow former employees to obtain unemployment compensation benefits even though the payment of such benefits cost the Respondent in deductions made by the State of Colorado. However, Haskins stated that he had contested two other unemployment compensation claims because the employees had quit working for the Respondent during the busy season and then moved away.

Introduced into evidence as General Counsel's Exhibit 3 was a copy of the decision made by the State of Colorado Department of Labor and Employment regarding Stevens' claim. The form indicates that either party had the right to appeal that decision and have a hearing held on the matter before a referee. However, as indicated above, the claim was not contested. Thus, the initial administrative decision became final for unemployment compensation purposes. The "findings of fact and conclusion" set forth in General Counsel's Exhibit 3 indicates:

The claimant was discharged after questioning the employer about unfair labor practices. Evidence substantiated by the claimant indicates the employee was assigned additional duties that were not specified at the time of being hired. It is determined that the employer is responsible for the separation. Under Section 8-73-108(4) of the Colorado law, the claimant is entitled to a full award of benefits.

8. Conclusions

As discussed in the previous section, the decision of the State of Colorado Department of Labor and Employment regarding the Respondent's termination of Stevens was received into evidence in this proceeding. The Board has indicated that such a decision by a state agency is admissible into "evidence for whatever probative value it may have." Supreme Dyeing & Finishing Corp and Valley Maid Co., Inc., 147 NLRB 1094, 1095, fn. 1 (1964). However, the Board pointed out that the determination of the state agency was not controlling. Instead, in Bolsa Drainage, Inc., 242 NLRB 728 (1979), the Board held in fn. 1:

The state agency's determination was rendered under a statute with different definitions, policies,

and purposes than the National Labor Relations Act. Respondent does not show that the unfair labor practices issues in this matter were considered by the state unemployment tribunal. Our Decision, and that of the Administrative Law Judge, must be based upon an independent consideration and evaluation of the evidence received in this unfair labor practice proceeding.

With the foregoing guidance from the Board in mind, I conclude that the state agency determination regarding Stevens is of little probative value in the circumstances presented here. It will be recalled that the decision was not contested and apparently was based solely on the evidence presented by the claimant and without a hearing by a referee. That observation is not made in any way critical of the state agency. The procedures for appeal and a hearing are clearly spelled out in General Counsel's Exhibit 3, but those procedures were not invoked. In any event, as the Board has held in Bolsa Drainage, supra, an independent consideration and evaluation of the evidence is necessary.

In examining the evidence presented in this case, it appears that the Respondent has encouraged employees to advance their careers with the Respondent by acquiring the skills of an operating engineer. Thus, new employees have been informed of the Respondent's expectations in that regard, and specifically in the case of Stevens, he was encouraged to learn the job of oiling as a first step in becoming an operating engineer. Note also that Clark encouraged Stevens to learn how to operate a backhoe in the Respondent's yard. (See sec. 4 herein.) Rather than discouraging union membership, the evidence shows that the Respondent's management lent encouragement to Stevens to acquire an operator's skills and to join the Union. It will be recalled that it was Haskins who spoke to the Union's business agent in January or February 1980 regarding Stevens, and it was Haskins who instructed Clark to fill out the union application form for Stevens. Then Haskins advised Stevens of the hours during which the union hall was open, and Haskins inquired whether Stevens was going to the union hall. It was only after Haskins declined to pay Stevens an operating engineer's wage rate for Stevens' driving a truck that Stevens indicated that he was not going to join the Union. Of course, the truckdriver's job classification was not covered under the collective-bargaining agreement between the Union and the Respondent, although the Respondent had paid some longtime operators their contract wage rate when they performed truck driving work.

The foregoing circumstances do not suggest an employer with a bent towards discouraging union membership or activities among its employees. Nevertheless, it is urged by the General Counsel that Stevens was seeking to enforce the terms of the union contract when he refused to perform the task of oiling. As indicated in section 3 herein, Haskins stated that Stevens' refusal to oil was "a small reason" and played "a minor part" in Stevens' termination. Without repeating the findings of fact which are set forth in section 4, it will be recalled that the Respondent paid its truck drivers a higher rate of pay when they performed operator's work, but even so,

the higher rate of pay was \$1 an hour less than the union scale in the contract. Thus, by refusing to perform the task of oiling, Stevens was in effect refusing to work in a job covered by the collective-bargaining agreement at a wage rate which was less than the wage rate provided for in the contract. However, it appears that the union was at least aware of the fact that truckdrivers and laborers sought to advance their careers by gaining experience through on-the-job training in operator's jobs. (See sec. 2 herein.) Particularly during the busy season, such persons would have the opportunity to move up into operating engineers' positions, if earlier they had acquired the necessary experience. (See sec. 2.) The logical result of such career advancement would be more members for the Union because those persons would be working under the terms of the collective-bargaining agreement and the union-security clause would apply. (See G.C. Exhs. 2 and 2(a).)

Significantly, Stevens was not terminated, nor even disciplined in any way, for his refusal to perform the task of oiling. It was only after Stevens refused to deliver the load for Bickhard Construction to the Boulder Memorial Hospital jobsite on June 26, 1980, that Stevens was fired. I conclude that it was Stevens' refusal to deliver the load on June 26, 1980, which precipitated his termination by the Respondent. His earlier refusals to perform certain work, such as oiling or driving the Dodge trucks, had been condoned by the Respondent. Haskins had felt that he could "work around them," and he felt that the matter would straighten itself out because he expected Stevens to become an oiler, rather than a truck driver, for the Respondent. The Respondent's willingness to overlook Stevens' earlier refusals to work, and to take no disciplinary action regarding them, is not illogical in view of the favorable opinions unanimously held by management of Stevens' ability as a truckdriver. (See sec. 4 herein.) In these circumstances, it seems reasonable to infer from the facts that Stevens' good job performance made him a valuable employee to the Respondent and caused the Respondent to acquiesce in Stevens' actions up to a point.

The Respondent's leniency with Stevens ended abruptly on June 26, 1980, when, in General Superintendent Clark's view, Stevens refused to work once too often. As Clark told Haskins that afternoon when Haskins returned to the Respondent's facility, "... this is the fourth or fifth time he has refused to do something around Boulder Excavating, and I couldn't function with an employee like that." (See sec. 5 herein.) Thus, it was the repeated nature of Stevens' refusals which finally prompted Clark to recommend that day that Stevens be fired.

As indicated in section 6, I found to be credible the fact that Haskins had made his decision to terminate Stevens prior to the conversation late in the afternoon of June 27, 1980, between Haskins and Stevens. Haskins' testimony in that regard finds support in Clark's testimony that Haskins told him prior to that conversation, "Well, I'm going to take your recommendation." (See sec. 6 herein.) Under those circumstances, I conclude that the evidence shows that Haskins had already made up his mind to terminate Stevens prior to their conversa-

tion that afternoon, and, thus, the matters asserted by Stevens in that conversation did not result in his termination

Finally, I conclude that the Respondent's action in terminating Stevens was not without precedent. About a year earlier, Haskins had terminated another employee, Dan Ashley, for refusing to make a delivery to a jobsite. (See sec. 4 herein.)

After considering all of the foregoing, and the arguments persuasively presented by the attorneys, I conclude that the Respondent has established that the termination of Stevens would have taken place on June 27, 1980, even in the absence of any union activities or protected activities by Stevens. Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980). Accordingly, I further conclude that a preponderance of the evidence does not show that the Respondent has violated Section 8(a)(1) and (3) of the Act, and I must recommend to the Board that the General Counsel's complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

- 2. The union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent has not engaged in the unfair labor practices alleged in the General Counsel's complaint in this proceeding for the reasons which have been set forth above.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER1

It is hereby ordered that the complaint in this proceeding be dismissed in its entirety.

¹ In the event that no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Board's Rules and Regulations, be adopted by the Board and shall become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.